SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-003436-22

JANET COLE,	:	
Plaintiff-Appellant	:	CIVIL ACTION
v.	:	**ON APPEAL FROM**
CITY OF ESTELL MANOR	:	Law Division of Superior Court
PLANNING/ZONING BOARD,	:	Docket # ATL-L-003192-21
Defendant-Respondent	:	**SAT BELOW**
_____	:	Honorable Sara Beth Johnson

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT JANET COLE

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Summary Judgment Listing

R. 2:6-1 (A)

Plaintiff Janet Cole:

Defendant Planning/Zoning Board of the
City of Estell Manor:

The Joint appendix provided to the trial court has been separated into Volume "A" and volume "B", and has been submitted in the same format to this Appellate Court. The transcript was part of the submission to the trial court, and hence, has not been separately set forth.

PRELIMINARY STATEMENT

Governmental proscriptions on zoning/land use permits are not exempt from judicial scrutiny. Due process protections require parties be granted not only the right to a hearing but also a full proper review of their evidence and submissions when seeking hardship zoning variances. Trial courts are required to evaluate the entire record in a de novo review. Plaintiff-Appellant Janet Cole, challenges the trial court's grant of summary judgment allowing to stand a Resolution 5-2021, issued by the City of Estell Manor Planning/Zoning Board, which rejected her hardship variance request to allow development of her property. The Defendant Board erroneously concluded plaintiff submitted the same request, as a different applicant, which the Board previously denied by Resolution 3-2021. That first application sought a bulk variance for the frontage set back, and proposed over 3,600 square feet of building development, a breezeway, two impervious driveways, and 25,440 square feet of land clearing. Plaintiff submitted a new application which drastically reduced the scope of the intended use. Citing res judicata, defendant rejected plaintiff's application. In granting dismissal of plaintiff's complaint in lieu of prerogative writs, the trial court also applied the doctrine of res judicata, mistakenly concluding the two applications were substantially similar and the significant changes did not differentiate plaintiff's variance request. Accordingly, finding plaintiff sought the "same relief"

previously adjudicated and denied by Resolution 3-2021, summary judgment was ordered.

On appeal, plaintiff maintains the hardship variance sought for her property (Block 24, Lot 12.02 on the tax map of the City of Estell Manor) should have been granted. As a matter of law, res judicata could not be applied to plaintiff's application, because the parties and the subject matter are distinctly different requiring individualized review. Further, the trial court, like the defendant, failed to properly consider the specific evidence, including: (1) in 1986 and 1987 the Pinelands Commission issued a hardship waiver of strict compliance for plaintiff's property, which directs a defined front yard setback\; (2) plaintiff's lot and proposed use are fully compliant with the Estell Manor master plan and ordinances, except for the 200-foot setback, which is overruled by the Pinelands waiver, permitting construction to occur within 100 feet of Maple Avenue. Plaintiff's application varied considerably from that denied in Resolution 3-2021, in as much as she proposed a one-third reduction in building density, elimination of the additional breezeway and driveway, almost 60% reduction in square feet of land clearance; an increased western side-yard to enhance buffering and plantings, and adopted all suggestions from the City's engineer regarding the septic system, seasonal water table, stormwater management, and road visibility concerns, and the joint expert recommendations, making the development conforming; and contrary

to the court's unsupported finding plaintiff's proposal would destroy the secluded nature of the neighborhood, plaintiff's lot is the last open lot in its seven-lot subdivision, adjacent to a 2,499-acre NJDEP property on two sides, and a five-acre homesite with a fully cleared front yard with a similar non-conforming setback. Another significant error by the trial court was the acceptance of public lay objections although refuted by the expressed findings of the Pineland's waiver and the testimony presented by joint experts, to mistakenly conclude: "Plaintiff seeks a variance to place improvements on what is, and what has always been, an unbuildable lot."

Following a thorough review of the record and application of the legal principles guiding plaintiff's request, this court is asked to reverse the order of summary judgment, and vacate the Resolution 5-2021.

PROCEDURAL HISTORY

1. In 1957, Plaintiff's predecessor in title obtained a valid subdivision of his property on Maple Avenue in Estell Manor, NJ, creating the lot subject to this appeal. In July 1985, Appellant entered a contract to purchase this property, contingent on Pinelands approval for constructing a single-family home (Ja188-190).

2. On August 8, 1986, the Pinelands Commission issued a report with findings of fact on the application (Ja192-195).

3. This was followed by a Notice of Filing dated January 23, 1987 (Ja197-198).

4. Appellant and her late husband purchased this lot on April 1, 1987 (Ja268-269).

5. On December 15, 2014, the Pinelands Commission issued a confirming letter (Ja271-272).

6. The Code of the City of Estell Manor, as currently effective, was adopted on April 7, 2021, as Estell Manor Ordinance No. 1-2021.

7. On June 18, 2020, William Mitchell, proceeding pro se under color of contract, submitted an application to the Estell Manor Planning/Zoning Board for relief under N.J.S.A. 40:55D-70(c)(1). (Ja156-184).

8. This matter was heard by the Board on January 27, 2021, and their decision was set forth in Resolution 3-2021, denying the relief sought by Mr. Mitchell (Ja224-233). Notably, pages 231-232 set forth the Board's conclusions.

9. On June 29, 2021, Janet Cole applied to the Estell Manor Planning/Zoning Board for relief on the subject property (Ja238-254). The matter was heard before the Board on July 21, 2021, and the denial of relief was memorialized on August 27, 2021, in Resolution 5-2021 (Ja289-298).

10. On October 6, 2021, Janet Cole filed her complaint in lieu of prerogative writs with the Law Division of Superior Court, receiving Docket #ATL-L-003192-21 (Ja1-5).

11. Defendant Estell Manor answered, and the issue was joined (Ja6-11).

12. A case management order was entered by Judge Johnson on March 24, 2022 (Ja298-299).

13. Oral argument was held on July 14, 2022, and the decision was tabled to allow the parties to explore settlement options. They were unsuccessful, and the Court rendered its decision on May 26, 2023 (Ja12).

14. A motion for reconsideration was timely filed, and the decision was rendered on July 7, 2023, denying the relief requested (Ja21).

15. This appeal has been timely filed and is underway.

STATEMENT OF FACTS

As Justice Stein reminded us in Lang v. Zoning Board of Adjustment, 160 N.J. 41, 45 (1999):

> As is often the case in variance appeals, a detailed understanding of the relevant facts is an indispensable prerequisite to the correct application of the controlling legal principles.

Justice Stein further noted in Medici v. BPRCo., 107 N.J. 1, 9 (1987), wherein he quoted Justice Holmes, and state that "a page of history is worth a volume of logic."

Apt to this matter is the history of plaintiff's lot. Agnes McGowan and her husband built a house at 76 Maple Avenue, Estell Manor, in 1975, which she sold to Robert and Janet Cole in 1980 (T. p. 6, l.22-23). This structure is 120 feet back from Maple Avenue, and its entire front yard is cleared of trees and other vegetation. (Ja1, L. 22-23). In 1980, the only houses in the area on Maple Avenue were the Coles' home and Mrs. Waszen's next door, now owned by the Mosleys. (Ja31-32).

On July 12, 1985, Robert and Janet Cole entered a contract to purchase what is the subject lot, (Block 24, Lot 12.02 on the tax map of the City of Estell Manor), commonly known as 78 Maple Avenue. The contract provided: "This agreement is subject to the buyer being able to obtain Pinelands approval and all municipal and state permits required to construct a single-family dwelling." (Ja190, #23).

On August 8, 1986, following review, the Pinelands Commission issued detailed findings of fact, establishing "the parcel is located in a Forest area" and "a portion of the property is a hardwood swamp." The Pinelands Commission concluded the lot had "an extraordinary hardship" and granted a waiver to construct a single-family home subject to four criteria:

> a. Sufficient dry wells shall be installed to contain all stormwater run-off from the house.
>
> b. The driveway shall be constructed of crushed stone or other permeable material.

> c. All development shall be located within 100 feet of Maple Avenue. The septic system shall be located between the house and the road.
>
> d. The septic system shall be located in an area where the seasonal high water table is at least 5 feet below the natural ground surface.
>
> [(Ja190-195)].

Reconsideration options in respect of the waiver were prominently noted on the Pinelands determination, providing an eighteen-day timeframe. Copies of the determination were issued to the Secretary of the Estell Manor City Planning Board, among others. No reconsideration was sought by any noticed party, particularly the City of Estell Manor. (Ja194-195).

Following receipt of the unchallenged Pinelands waiver, the Coles purchased the lot on April 1, 1987. (Ja200). On December 15, 2014, the Pinelands Commission re-confirmed the waiver of strict compliance, stating it remained in effect for this lot, and noting the waiver holds the status of "an adjudicated matter" and is entitled to such treatment. (Ja205).

The City of Estell Manor has a master plan and ordinances certified by the Pinelands Commission. Applicable ordinances provide context to the issues in dispute. Estell Manor Ordinance #380-35D requires that no development occur within 300 feet of a wetland. This standard aligns with the Pinelands Commission requirement and expresses the public policy of the City of Estell Manor. See Estell

Manor Ord. § 380-35D) (located at http://www.estellmanor.org/images/Estell_Manor_Final_Code_post-draft_.PDF). Ordinance 380-33, sections 6 and 7, require front yards in the subject zone be as close to 200 feet as practicable. (Id.). Single-family dwellings are permitted uses in this zone, (Ja217), now classified as an R-25 zone.

In April 2020, plaintiff entered a contract to sell the subject lot to William Mitchell. Mitchell, representing himself, filed an application for a front yard setback variance with the Estell Manor Planning Board. Mitchell's application included plans to develop 3,600 square feet in two buildings, two driveways, a breezeway, a garage under the house, plus additional impervious coverage, all within the designated construction area. The application was heard by the Board on January 27, 2021, and the variance request was denied in Resolution 3-2021. (Ja156-162).

A review of Resolution 3-2021 reveals several material omissions and factual mistakes with respect to the subject lot. Importantly, the Resolution fails to incorporate the material findings and conclusions reached by the Pinelands Commission as expressed in its waiver, which permits development of the lot and instead found the applicant failed to satisfy the statutory "positive" criteria, despite the Pinelands waiver's findings and conclusions firmly establishing positive criteria have been met. The Resolution ignored the impact of Ordinance 380-35D and

erroneously states that "all neighboring properties have front-yard setbacks of 200 feet or greater," a fact disproven by defendant's City engineer's aerial photo showing even the house immediately next door to the subject lot has its entire front area cleared and is approximately 120 feet from the road. (Ja224-229, generally, and 231-232). The Resolution also noted Mitchell's "variance request will result in substantial development within too small an area." Mitchell withdrew his proposal to purchase the subject lot.

Recognizing defendant's review with respect to density and intensity, but also realizing defendant omitted consideration of the Pineland's Commission waiver, she decided to propose a home, which substantially reduced the intensity of the development and assert the positive criteria permitting development were satisfied by the establishment of hardship, as adjudicated by the Pinelands Commission's controlling Findings of Fact, applicable to the subject lot. (Ja231, par. 3, l. 8).

Defendant held a public hearing for plaintiff's application on July 21, 2021. Distinguishing her proposal from Mitchell's Plaintiff reduced the building coverage area conforming to that allowed by the Pinelands waiver from 14% to 5% and increased the side-yard buffer to 100 feet from the only adjacent neighboring house. She agreed to and adopted all the recommendations of Defendant's engineer. (Ja238-243).

During the hearing, expert testimony was presented from two engineers advancing plaintiff's proposal. The public portion accepted statements from five lay witnesses.

In its resultant resolution, defendant mistakenly concluded plaintiff's application was the same as Mitchell's, failed to weigh the differences between the distinctly different applications, submitted by different parties, and barred her hardship variance for the front set back relying on res judicata (id.).

In the instant proceeding, initiated by plaintiff's submittal of a complaint in lieu of prerogative writs, the trial court reached its conclusion by relying on the testimony of five opposing lay witnesses, whose claims opposing the development, were unsupported net opinions, refuted by expert testimony of both plaintiff and defendant's engineers. Additionally, the court disregarded the Pinelands Commission findings and conclusions, as well as the Estell Manor policy considerations set forth in the City's ordinances. (Ja13- 20, esp. 19a, sect. II, unnumbered lines three and four). The trial court further denied plaintiff's a motion for reconsideration on July 7, 2023. (See docket). This timely appeal followed.

LEGAL ARGUMENT

1. The Standards of Review.

a. Res Judicata.

The well-established standards for res judicata, including in zoning cases, are articulated in Mazza v. Board of Adjustment of Linden, 83 N.J. Super. 494 (App. Div. 1964). At 496, these standards are defined as: (1) the application is similar or substantially similar to a prior application, (2) the same parties or privies are involved, (3) there are no substantial changes between the applications or conditions affecting the property, (4) there was a prior adjudication on the merits, and (5) both applications seek the same relief. Each of these elements must be applied to the facts, and the resulting legal conclusions must be independently evaluated through the de novo review of an appellate court.

However, res judicata prevents the re-litigation of issues only if the second application is substantially similar to the first. In Russell v. Bd. of Adjustment, 31 N.J. 58, 155 A.2d 83 (1959), it was held that res judicata applies when the applications are substantially similar. In the case of Janet Cole, her revised application included a 50% reduction in building size, elimination of a second driveway, and other modifications that constitute substantial changes. The Pinelands waiver's findings of hardship and the revised application's compliance with expert recommendations further distinguish it from the Mitchell application.

An adjudicative decision of an administrative agency, such as a planning board, should be accorded the same finality as a court judgment. Res judicata supports finality and prevents re-litigation of issues already decided. Bressman v. Gash, 131 N.J. 517, 526, (1993).

Courts should not preclude a board from considering a second application if it contains sufficient changes. Bressman v. Gash, 131 N.J. at 527. The determination of the sufficiency of a change lies with the planning board and should be overturned only if shown to be unreasonable, arbitrary, or capricious.

b. De Novo Review.

The trial court had an obligation to conduct a de novo review of all reasonable factual bases for the conclusions drawn by the Defendant Planning Board, both in the Mitchell application and in the Cole application. It then needed to review the legal conclusions derived from these facts and principles. The trial court erred by not performing this analysis. The legal conclusions rendered or incorporated by the Planning Board are not entitled to any special deference, just as the trial court's interpretation of the law and legal consequences of the facts are not entitled to any special deference. See Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019), cited in *New Jersey Standards for Appellate Review,* Wry and Hall, August 2022 version, p. 25, par. B. Further, as noted on page 26 of *New Jersey Standards*:

> If a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and becomes an arbitrary act, not subject to the usual deference." (Citing Summit Plaza Associates v. Kolta, 462 N.J. Super. 401, 409 (App. Div. 2020)).

In Wyzykowski v. Rivas, 132 N.J. 509, 518-520 (1993), it is emphasized that boards may review and evaluate factual assertions and reach reasonable conclusions, which will be afforded due deference by a reviewing court. However, legal determinations are not entitled to a presumption of validity and are subject to de novo review by the court. Therefore, a de novo review of the relevant facts and law must now be undertaken by this court.

Plaintiff further draws the attention of this court's opinion in CBS Outdoor v. Lebanon Planning Board, 414 N.J. Super. 563 (App. Div. 2010), instructing:

> A reviewing court's analysis must focus on the validity of the Board's action; . . . (citations omitted). Although the scope of review of a local governmental agency decision is circumscribed, it is 'not simply a pro forma exercise in which [the court] rubber stamp(s) findings that are not reasonably supported by the evidence.' (citations omitted).
>
> [Id. at 578.]

Further, "[b]ecause the memorializing resolution of the Board is the wellhead for the judiciary's consideration of the validity of municipal action, . . . [t]he resolution must rise or fall on its merits. [A] mere recital of testimony or conclusory statements couched in statutory language is insufficient." Id. at 580-81.

c. Jurisdiction – This argument was not expressly made below.

Jurisdiction is power. The power of a municipality is governed by the authority created under the New Jersey Constitution and put into effect by the New Jersey legislature. The New Jersey Constitution, at Art. IV, sect. 6, par. 2, permits the Legislature to delegate to municipalities the responsibility for regulating local land use by means of zoning schemes. Our Legislature has done so through the enactment of the Municipal Land Use Law. However, local authority is not unbridled.

In 1979, the Legislature adopted the Pinelands Protection Act, which has been implemented through the Pinelands Comprehensive Management Plan (CMP), which has jurisdiction over the property subject to this appeal. A municipality "may not deny the proposed development based on requirements in its land use ordinance which are also regulated by the Comprehensive Management Plan. To allow such a denial would allow a local decision to supersede the Pinelands Development Approval." Fine v. Galloway Tp. Committee, 190 N.J. Super. 432, 442 (Law Div. 1983). The Board and the trial court have ignored these constraints.

An excellent summary of the jurisdiction of the Pinelands Commission is found in Peg Leg Webb, LLC v. New Jersey Pinelands Commission[1], an

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[1] Pursuant to R. 1:36-3, a copy of this opinion is included in the joint appendix.

unreported opinion, Superior Court, Appellate Division Docket #A-4016-15T4, decided October 11, 2017, pages 2-4. On page 3, it states:

> No development can be approved within the Pinelands unless it conforms with the CMP. In fact, it 'shall be unlawful for any person to carry out any development in the Pinelands Area which does not conform to the minimum standards of [the] Plan' N.J.A.C. 7:50-1.4.

The opinion continues, in footnote #1, explaining that the Commission is authorized to waive strict compliance to alleviate extraordinary hardship, referring to N.J.S.A. 13:18A-10(c). No jurisdiction to negate a Pinelands waiver is afforded to a municipality, and the power of a planning board to do so does not exist.

The Planning Board does not have jurisdiction over the subject matter of the waiver issued by the Pinelands Commission. The trial court does not have subject matter jurisdiction over the Pinelands waiver or over the contents of Estell Manor's certified master plan.

This court should note:

> Although the court does not have jurisdiction over the subject matter, it may have jurisdiction to determine the question whether it has jurisdiction over the subject matter and to bind the parties by its determination, with the result that thereafter they are precluded from successfully contending that the court had no jurisdiction over the subject matter.

Res Judicata and Jurisdiction Over the Subject Matter, 18 Wash. & Lee L. Rev. 290 (1961), at 294.

Plaintiff asserts defendant and the trial court were bound by the Pinelands Act and the facts found to establish the waiver issued under its authority. The arbitrary refusal to determine the question of whether the defendant and/or the trial court had jurisdiction over the Pinelands waiver allowed them to ignore the legal conclusion mandated by these facts. It also allowed Defendant and the trial court to ignore established policy of the City of Estell Manor in its certified ordinance. In its review, the trial judge ignored defendant's misstep "as practicable" aspect of Ordinance 380-33, sections 6 and 7, and Ordinance 380-35D, and the waiver.

By arbitrarily enforcing the front yard setback standard and disregarding the incorporation of the waiver and policy in the master plan, they have effectively altered the subject matter, over which they have no jurisdiction. This prevents interested parties from obtaining the relief anticipated by the established public policies.

d. Statutory Construction.

The Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., must be read in conjunction with the Pinelands Comprehensive Management Plan (CMP), and the certified master plan and ordinances of the City of Estell Manor. The Legislature has granted the Pinelands Commission jurisdiction over standards affecting real property development in the Pinelands area. As stated in Fine v.

Galloway Tp. Committee, 190 N.J. Super. 432, 443 (Law Div. 1983), "A municipality may not contradict a policy established by the Legislature."

In reviewing a local decision, the court must determine whether the Board followed statutory guidelines and properly exercised its discretion. As established in Burbridge v. Governing Body of Mine Hill, 117 N.J. 376, 385 (1990), the Legislature's intent is clear.

> With regard to Pinelands regulations, N.J.S.A. 13:18A-27 provides:
>
> > Enforcement of provisions of this act over inconsistent or conflicting acts. It is the intent of the Legislature that, except as otherwise specifically provided for in this act, in the event of any conflict or inconsistency in the provisions of this act and any other acts pertaining to matters herein established or provided for or in any rules and regulations adopted under this act or said other acts, to the extent of such conflict or inconsistency, the provisions of this act and the rules and regulations adopted hereunder shall be enforced and the provisions of such other acts and regulations adopted thereunder shall be of no force and effect.
>
> Furthermore, the Legislature has made it clear that the Pinelands Protection Act and the regulations adopted under it supersede the MLUL when they conflict. As noted in Uncle v. New Jersey Pinelands Commission, 275 N.J. Super. 82, 90-91 (App. Div. 1994):
>
> > The Pinelands Protection Act and the regulations adopted under it supersede the MLUL when they conflict.
>
> This directive must also be read in conjunction with the MLUL, where N.J.S.A. 40:55D-10.5 states:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development.

By interpreting these statutes and regulations together, it is evident that the Pinelands Commission's authority and standards take precedence in cases of conflict with municipal regulations, ensuring consistent and overarching management of the Pinelands area.

e. The Planning Board is limited to Fact-finding, not policy-making.

A fundamental goal of American jurisprudence is to integrate constitutions, statutes, regulations, ordinances, and waivers to ensure the practical operation of government under the law. To achieve this goal, municipalities establish policies that align with the enabling sources of authority assigned to them. The City of Estell Manor has a certified master plan and enabling ordinances that contain the policies to be followed by its fact-finding boards and agencies.

Ordinance section 380-33, paragraphs (6) and (7), stipulate that setbacks in the R-25 zone should be as "close to 200 feet as practicable." Additionally, ordinance section 380-35D requires that no development shall occur within 300 feet of wetlands. By applying all the physical facts of this application in conjunction with the Estell Manor ordinances, the policies established therein, and

the Pinelands waiver, a comprehensive factual basis is created from which factual and then legal conclusions can be drawn.

As noted in Russell v. Tenafly, 31 N.J. 58, 65 (1959):

> The function of boards of adjustment, in deciding an application, is essentially fact-finding, as opposed to policymaking.

In this case, the Board and the trial court claimed to review the "merits" but avoided examining the items that would have necessitated a legal conclusion consistent with the policies contained in the statutes and regulations promulgated by the Legislature, as well as the ordinances of the City of Estell Manor. This avoidance undermines the factual and legal integrity of their conclusions and contravenes established jurisprudential goals.

POINT I

THE SUBJECT PROPERTY HAS AN ACTUAL, PHYSICAL HARDSHIP

(Ja41, L. 14-21; Ja44, L. 5-21; Ja46, L. 7-20; Ja48, L. 4-7; Ja94 L. 9-22; Ja106, L. 14-16, L. 21-24; Ja151, items 1, pars. 4, 5, 7, 8; Ja192-195; Ja197-199-letter; Ja205-206-letter; Ja217, sect. IV, #1,2,3; Ja260-272-Pineland findings letters)

Applications for hardship relief were submitted by both Mitchell and Cole due to physical features uniquely affecting this property. N.J.S.A. 40:55D-70(c)(1)(b) affords hardship relief "by reason of exceptional topographic conditions or physical features affecting a specific piece of property."

The Report on an Application for a Waiver of Strict Compliance, issued for the subject lot on August 8, 1986 (Ja260-263), contains two and one-half pages of

single-spaced findings of fact that support the basis for the waiver. These findings irrefutably establish exceptional topographic conditions, including an active watercourse at the south end of the lot, which requires a buffer as mandated by the Pinelands. A copy of this report was sent to the Estell Manor Planning Board, and on January 29, 1987, the Pinelands Commission issued a Notice of Filing, with a copy also sent to the City of Estell Manor.

The Estell Manor ordinances, reflecting the policy of the City, require a 300-foot buffer from any wetlands. This Finding of Fact document establishes the topographic condition underlying the actual hardship suffered by the subject lot, with 89% of the total lot serving as a necessary buffer to the stream.

No testimony, evidence, or proof has been produced that remotely challenges these findings. The testimony of the City engineer supports this hardship fact. The record in both the Mitchell and Cole applications contains no evidence refuting these findings. Despite this, the facts established by the Pinelands were not included in the "Merits" that form the basis for any determinations or legal conclusions by the Board or the trial court.

Consideration must also be given to the comments in Hawrylo v. Board of Adjustment, 249 N.J. Super. 568, 579 (App. Div. 1991), where it was noted that the Legislature, in 1984, broadened the term 'hardship' to "specifically include an

extraordinary or exceptional situation uniquely affecting a specific piece of property."

In Ten Stary Dom Partnership v. Mauro, 216 N.J. 16 (2013), at p. 29, it was emphasized:

> Hardship, however, is not synonymous with complete inutility due to the land use restriction, although the inability to use the property for any productive use absent a variance often informs the decision to grant a variance from bulk requirements.

Consider the following: the Pinelands requires a setback of no more than 100 feet; the City of Estell Manor ordinances, and hence its policy, prohibit construction within 300 feet of wetlands. Wetlands are established on 89% of the total property, and another part of the Estell Manor ordinances urges a 200-foot setback in the R-25 zone, when practicable.

This comprehensive understanding of the physical and regulatory constraints underscores the legitimacy of the hardship claims and the necessity for appropriate relief.

POINT II

THE RESULT WHEN THE PINELANDS FINDINGS MUST BE ACCEPTED.

(Not argued below)

At both the Mitchell and Cole hearings, the Estell Manor Planning Board sifted through the facts presented but chose to ignore the findings of the Pinelands

Commission. The trial court similarly disregarded this legislatively established source of factual determination. Plaintiff-Appellant submits that the Pinelands Commission's action definitively establishes that the subject property has met its burden of proof regarding the positive criteria for 'hardship' specific to this lot.

As detailed in Cox & Koenig, New Jersey Zoning and Land Use Administration, GANN (2023), p. 430, sect. 29-2.2:

> A hardship (b) application might involve a property where the rear portion of the lot drops off very sharply. There it may be necessary to locate a proposed building closer to the front property line than otherwise permitted by the ordinance.

The Estell Manor Tax Map, found at Ja 176a, illustrates the proximity of Lot 12.02 to Stephen Creek. The Defendant Planning Board did not acknowledge this map or integrate the established actual hardship into their deliberations or decision. The trial court also overlooked this finding and failed to determine the legal consequences flowing from this factual establishment.

Due to the pre-emption of the setback issue, this lot does not require a variance to build within 100 feet of Maple Avenue. It is, and will be, compliant with the controlling Pinelands waiver and consistent with the policy of the City of Estell Manor, as set forth in their certified master plan and ordinances. The trial court's use of the term "Merits" masks the rubber stamp given to the discriminatory application of some of the facts and policies presented.

POINT III

MITCHELL APPLICATION SUGGESTED A SECOND SUBSTANTIAL USE, COLE'S DID NOT CONTAIN SPECIFIC REFERENCE TO SECOND PRINCIPAL USE

(Transcript, Ja218, item #5)

In the Resolution for the Mitchell application, the Board observed on Ja 228a, lines 13-14, that "The primary building with attached pole barn will be large in context of the available developable area." Further, at Ja 231a, par. 3, line 8, the Board concluded, "The variance request will result in substantial development within too small an area." This conclusion affronts the 'negative criteria' outlined in N.J.S.A. 40:55D-70(c)(1).

The Board's conclusion on this point is supported by an analysis of evidence contained in the exhibits. According to Ja 174a, the front width of the lot along the road is 254.4 feet. With a depth of 100 feet, this provides 25,440 square feet available for development use. If the balance of the lot is not included in development calculations, a 3,600 square foot building array would occupy more than 14% of the buildable ground, even before considering the impervious driveways. This exceeds the 10% limit specified in the City's ordinance (see Ja 217a).

Moreover, Ja165 reveals Mitchell's plan included a separate driveway on the east side of the lot to service the proposed pole barn, a fact overlooked by the trial

court. This driveway constitutes a second principal use given its separate access, as noted by the Board's engineer in his comments on Ja218, par. 6. The second driveway does not serve the principal use, the home.

As established in Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 104-105, a driveway providing access to a use other than the primary use on the lot cannot be construed as an accessory use. It must be considered a second principal use, requiring a variance under section d(1). This principle is also noted in *Cox & Koenig,* New Jersey Zoning and Land Use Administration (GANN, 2023) sec. 29-2.3, p. 431.

In contrast, the Cole application did not present this driveway issue. However, the Board failed to conduct this analysis at the conclusion of the Cole presentation. Although these documentary items were in evidence before the Board and the trial court, they were unreasonably not considered or factored into the conclusions. The failure to consider submitted evidential material leads to arbitrary conclusions.

POINT IV

THE NATURE OF A 'SUBSTANTIAL CHANGE' IN AN APPLICATION.

(Ja45, L. 8-14; Ja49, L. 24-P. 50, L. 20; Ja51, L. 1-11)

In Toll Brothers v. Board of Chosen Freeholders of Burlington, 194 N.J. 223 (2008), the court emphasized that:

> The question for a municipal agency on a second application thus centers about whether there has occurred a sufficient change in the application itself to warrant entertainment of the matter again.

In the present case, both the Board and the trial court failed to ask this critical question and did not consider the fact-based answers that were evident.

In the instant case, Plaintiff Cole submitted a significantly revised plan, reducing the house size from 1800 square feet in the Mitchell application to 1200 square feet. Additionally, she removed the breezeway, eliminated one full driveway, removed the basement garage, and increased the western side yard from 50 feet to 100 feet.

These substantial changes clearly meet the criteria for considering a second application and should have been properly evaluated by the Board and the trial court.

POINT V

PLAIN ERROR IS IN THE INITIAL OPINION OF THE TRIAL COURT

(Ja12-20)

Reference is made to the trial court's Order and Memorandum of Decision, set forth at Ja12-20.

a. Primacy of Pinelands Waiver

First, Plaintiff notes that, as a matter of law, the Pinelands waiver controls the setback question due to the legislative ends of the Pinelands legislation. The

trial court fails to recognize the primacy of the Pinelands authority, its findings of fact, and its conclusions.

Starting on p. 14a, Plaintiff-Appellant agrees with the first five paragraphs of the trial court's opinion. However, in the sixth paragraph, the trial court references a decision by the Board 'on the merits' without differentiating between the positive and negative criteria, which are not quantified. The trial court's position lacks an enumeration of the factual "merits" from which legal conclusions may be drawn. This omission fails to identify the relevant sections of the Estell Manor ordinance, creating a significant oversight of both matters considered and matters neglected.

b. Legal Conclusions from Pinelands Waiver

The only legal conclusion possible from the Pinelands waiver is that the property has topographic conditions that constitute textbook hardships, meeting the positive criteria of N.J.S.A. 40:55D-70(c)(1). Ignoring the findings of the Pinelands Commission is arbitrary.

c. Frontage Misstatement

In the seventh paragraph, the trial court references "across the 150-foot front of the property." The evidence reveals that the frontage is actually 254.4 feet. The Cole application proposed reducing the area to be cleared to only 150 feet, a substantial 104.4-foot reduction.

d. Misleading Similarities

In the eighth paragraph, the claimed 'similarities' are misleading. A residence is a permitted use in this zone, requiring no variance application for this use. There are no municipal restrictions on increasing the existing grade, and there were no objections from the City engineer. The retaining walls and dry wells (to contain stormwater) are requirements from the 1986 Pinelands waiver, not part of the application. The Pinelands waiver references one driveway, as does the Cole application, whereas the Mitchell application proposed two driveways. The proposed septic system is regulated by the County Department of Health and is not part of either application. The Planning Board has no jurisdiction over the septic system. Clear-cutting along Maple Avenue is necessary to bring construction equipment onto the property, consistent with the neighboring house as seen in aerial photographs, and there is no applicable ordinance standard for this property.

The trial court's reasoning is akin to an 'Alice in Wonderland' approach to jurisprudence, questioning how one can obtain a meaningful permit to construct a home without removing the trees currently occupying the space needed for the home and its necessary accessories.

e. Mistaken Assertion on Exhaustion of Remedies

On page 15a, third paragraph, the trial court mistakenly asserts that the parties have abandoned their claims that the other party failed to exhaust their

administrative remedies. For the Plaintiff, this is incorrect. This matter was fully briefed in the Motion for Reconsideration. The City of Estell Manor did not protest or appeal the Notice of Filing issued by the Pinelands Commission in 1986, 1987, and 2014, which removes the basis for an objection to the 100-foot setback granted in the Pinelands waiver. The defendant Planning Board cannot now reject the Pinelands findings when their parent, the City, did not object.

f. Net Opinion Lay Testimony

On pages 16a-19a, the trial court gives undue attention to the testimony of 'several residents' regarding the Mitchell and Cole applications. This net opinion lay testimony raised issues definitively answered by both Plaintiff's expert, Mr. Orlando, and the City engineer, Mr. Scheidegg.

In the transcript, p. 69, L.9-11, Mr. Scheidegg noted that wetlands in the rear of the property limit development, and that topography runs from Maple Avenue (L. 13). The waiver of strict compliance required seepage pits at the four corners of the house for the downspouts (L. 19-21). On T. page 73, L. 10-25, the issue of the permitted, legal location for the septic system is definitively answered. Yet, the trial court overlooks this expert testimony, relying instead on questionably relevant lay testimony expressing concerns about flooding on an uphill property, mosquitoes near a large South Jersey swamp and wetlands, and the septic system and water table.

In the final analysis, at t. p. 77, L. 12 – p. 80, L. 22, the City engineer, an expert, states that the septic system proposed for this lot is "…designed in accordance with the County Health Department regulations."

POINT VI

WAS THERE SUFFICIENT CHANGE FROM THE MITCHELL APPLICATION TO THE COLE APPLICATION?

(Ja158, par. 15; Ja165, drawing of driveways; Ja240, #15; JA245-drawing; Ja292, par. 2.)

Both the Mitchell application and the Cole application benefit from the Pinelands waiver, as clearly set forth in that document. However, the applications differ significantly in the development each proposes for the subject lot. An objector to an application must demonstrate substantial similarity in both the application itself and the circumstances of the property. See Russell v. Tenafly, 31 N.J. 58, 65.

Mitchell proposed utilizing 14% of the buildable area, which the Defendant Board found too dense given the applicable ordinance's 10% maximum density requirement. In contrast, the Cole application proposed utilizing only 5% of the buildable area, and the Board did not repeat its finding that the proposed use was too dense.

As Russell, supra, at 66, articulates:

> The question for the board on a second application for a variance concerning the same property is whether there has occurred a

> sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the application. (citations omitted)... That the above requirement be liberally construed in favor of the applicant would be in accord with the purpose of boards of adjustment to provide the necessary flexibility to the zoning ordinance (emphasis added).

Furthermore, Russell, supra, at 67, emphasizes that elements of the new application relating to the nature and implementation of property use are valid reasons not to apply res judicata.

The Board and the Trial Court failed to consider the findings of fact provided by the Pinelands waiver or the policies considered in the master plan and ordinances. Consequently, the Board and the Trial Court did not adequately assess the 'merits' of the Cole application, particularly where Mitchell proposed two driveways, and the Pinelands waiver provided for only one driveway. By ignoring Estell Manor's policy of prohibiting development within 300 feet of wetlands, the Board failed to consider the intersection of that ordinance and the Pinelands findings. The Trial Court accepted the erroneous legal conclusions reached by the Board via the Board's, and hence the Court's, intentional ignoring of the established facts.

The Board concluded that the Mitchell application was too intense for the subject area but did not apply this reasoning when reviewing the Cole application. This inconsistency meant there was no factual basis to assess the legal impact of the new application. The Trial Court merely put a stamp of approval on a flawed

proceeding by the defendant, rather than conducting a *de novo* review of the legal conclusions based on established facts.

However, had the Board or the Trial Court applied the Russell standard of liberally interpreting res judicata standards, it could have factually evaluated the Cole application in light of expert facts and established policies.

POINT VII

JUDICIAL REVIEW BY THE APPELLATE COURT MAY REVERSE THE BOARD/TRIAL COURT DECISION IF ARBITRARY, CAPRICIOUS OR UNREASONABLE.

(Not raised below)

Our Supreme Court addressed the issue of judicial review of an agency decision in In the Matter of the Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370 (2013). On page 386, it states:

> …the arbitrary, capricious or unreasonable standard applicable to the review of administrative agency decisions subsumes the need to find sufficient support in the record to sustain the decision reached…. The point is beyond argument, for a failure to consider all the evidence in a record would perforce lead to arbitrary decision-making.

This standard emphasizes the necessity for a thorough and comprehensive review of the entire record. Any failure to consider all relevant evidence inherently results in arbitrary and capricious decision-making, undermining the integrity of the administrative process.

POINT VIII

THE NATURE OF THE NEGATIVE CRITERIA REVIEW

(Ja48, l. 23- p. 52, l. 19; and passim)

In addition to demonstrating that the subject lot suffers a hardship, thereby satisfying the "positive" criteria of the Municipal Land Use Law (MLUL), which the Plaintiff has shown, the application must also pass the 'negative criteria' examination, as outlined in N.J.S.A. 40:55D-70(c)(a) and (b). Specifically, it must be shown that granting the variance will not cause "a substantial detriment to the public good and will not substantially impair the intent and purpose of the zoning plan and zoning ordinance". Menlo Park Plaza Associates v. Planning Bd. of the Twp. of Woodbridge, 316 N.J. Super. 451, 460 (App. Div. 1998), certif. denied, 160 N.J. 88 (1999).

The five objecting neighbors and the Board members failed to provide any testimony, factual or otherwise, suggesting an impairment to the intent and purpose of the zoning plan and zoning ordinance. They avoided any analysis of the zoning plan and zoning ordinance altogether. The clear demonstration of no negative effect on the zoning plan is evident since this variance affects only one isolated property. For instance, at T. 41, l. 8-15, Board member Miller observed that the Pinelands waiver "doesn't apply to the other lots surrounding it."

The Plaintiff and expert witnesses have demonstrated that this lot will house a home, completing the development in an approved subdivision and efficiently concentrating housing in an approved area. It will meet all technical requirements when they are properly examined. The issue of "substantial detriment to the public good" remains. Plaintiff's expert, Mr. Orlando, testified at T. 55, l. 4-10, that this proposal does not pose a substantial detriment to the neighborhood.

At T. 98, l. 8-25, the neighbor to the west, Shaw, complained that stormwater would drain onto his property, ignoring the dry wells, i.e., the swales and berms, required and added to the plan (see City engineer's comments, T. 69, l. 19-22). Beginning at T. 100, l. 21 through T. 102, l. 25, Mr. Mosley opined, without expert assistance, that a house within 50 feet of Maple Avenue "will detrimentally impact the property values on our street" (p. 102, l. 23-25). Mrs. Wigglesworth provided her insight at T. 104, L. 2 through T. 109, l. 24, with her primary concern being that the value of properties on the street would decrease (T. 104, L. 13-15). At T. 110, L. 7 through T. 111, L. 1, Mrs. Morrison expressed concerns about stormwater, septic issues, and property values. Finally, at T. 111, l. 7 through T. 114, L. 11, Mr. Fern opined that he did not see a hardship on this property.

78 Maple Avenue is legally entitled to one single-family dwelling (no second principal use). It has a legally determined hardship finding that the City

never opposed and has presented expert testimony addressing environmental and operational elements with technical assurance of success. The proposed home will be visible from Maple Avenue, just as the neighboring home at 76 Maple Avenue has been since 1980, and it will buffer 76 Maple Avenue from the 2,499-acre state Green Acres property to the east and south. The visibility of the home cannot be construed as a "substantial detriment to the public good," especially given the lack of complaints about the visibility of 76 Maple Avenue from the street.

Black's Law Dictionary, Fourth Ed., 1968, defines 'Detriment' as "Any loss or harm suffered in person or property." It defines 'Substantial' as "of real worth and importance, of considerable value." After 120 pages of transcribed testimony, addressing technical stormwater and septic questions in an unrefuted manner, and acknowledging the fully cleared front yard and 120-foot setback of 76 Maple Avenue, the Planning Board of Estell Manor failed to reasonably conclude that the "negative" criteria had not been successfully addressed. They omitted reference to them, similarly to their failure to enunciate the "positive" criteria realized in this application.

CONCLUSION

The Planning Board of the City of Estell Manor has created a record that not only misaligns the facts associated with this property and this application but also seeks to collaterally attack the Pinelands relief granted. The Board exerted

jurisdiction in areas where it had none and arbitrarily and unreasonably ignored the substantive differences between the Cole application and the Mitchell application.

The trial court compounded this arbitrary and capricious act by selectively listening only to points that supported a favored conclusion, rather than conducting a balanced and thorough *de novo* review of the evidence presented.

The appropriate remedy is the reversal of the trial court's determination and the issuance of a zoning permit without conditions beyond those contained in the Pinelands waiver of strict compliance and as agreed to by the Plaintiff at the Board hearing.

Respectfully Submitted,

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Dated: 8/26/2024

229205857 v1

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-03436-22T2

JANET COLE,

Plaintiff-Appellant,

v.

CITY OF ESTELL MANOR

PLANNING/ZONING BOARD,

Defendant-Respondent.

CIVIL ACTION

ON APPEAL FROM

Superior Court, Law Division
Atlantic County
Docket # ATL-L-003192-21

SAT BELOW
Honorable Sara Beth Johnson, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT

CITY OF ESTELL MANOR PLANNING/ZONING BOARD

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PRELIMINARY STATEMENT

The instant matter involves an application by Plaintiff in June 2021 to obtain a front yard variance in the R-25 Neighborhood Zone in order to construct a single-family residence. The Planning Board for the City of Estell Manor correctly found that the Doctrine of Res Judicata applied to the application, as the same parties and/or their privies six months earlier sought substantially the same relief previously sought from the Planning Board in January 2021 and denied the application for that reason. There is more than ample evidence in the underlying record to support this decision and/or a denial of the variance application on its own merits as held by the trial court.

PROCEDURAL HISTORY

The Planning Board for the City of Estell Manor adopts the procedural history as contained in the Brief submitted on behalf of Plaintiff/Appellant Janet Cole.

COUNTER STATEMENT OF FACTS

1. The dimensions of Block 24, Lot 12.02 commonly known as 78 Maple Avenue are a width of 254.4 feet fronting Maple Avenue and a depth of 916.99 feet. Ja156, Ja217, Ja238, Ja275

2. Estell Manor Ordinance 380- 33 C. (6) states: "The front yard shall be as close to 200 feet as practicable, taking into consideration the depth of the lot in question."

3. The exact location of where wetlands are located upon Block 24, Lot 12.02 is unknown. Ja169, Ja170, Ja54 Line 9 to Line 15 and Line 20 to Line 23. Ja107 Line 19 to Ja108 Line 17, Ja245, Ja253.

4. The percentage of Block 24, Lot 12.02 that consists of wetlands is

unknown as the exact location of wetlands on this property has not been determined by any measurement description. Ja169, Ja170, Ja54 Line 9 to Line 15 and Line 20 to Line 23, Ja107 Line 19 to Ja108 Line 17, Ja245, Ja253.

5. The Variance Plans provided with the Mitchell application and with the Cole application for front yard variance relief failed to provide an exact location of where wetlands are located upon Block 24, Lot 12.02. The Variance Plans provided with both applications contained a dashed line showing an "approximate

location of existing freshwater wetlands line taken from NJDEP Mapping." A distance measurement was not provided. Ja169, Ja170, Ja245, Ja253

6. Estell Manor Ordinance 380-33 C. (7) states: "To the extent practicable, the requirements of the Schedule of Area, Yard and Bulk Requirements for the use in question and for the zone in question shall be adhered to."

7. Estell Manor Ordinance 380-35 D. states: "Performance standards for development in and near wetlands. No development in the Pinelands Area shall be carried out in a wetland or within 300 feet of a wetland unless the applicant obtains a conditional use permit under the provisions of Section 380-59."

8. The Mitchell application proposed construction of a single family dwelling with dimensions of 30 feet x 40 feet with a breezeway attached Pole Barn having dimensions of 30 feet x 40 feet. Ja158. The dimensions of the single family dwelling were amended during the hearing to 30 feet X 60 feet. Ja224

9. The Cole application also proposed construction of a single family dwelling with dimensions of 30 feet x 60 feet with garage.

Ja245. Plaintiff committed to use of this footprint for purposes of obtaining a building permit. Ja45 line 4 to Line 9.

10. Both the Mitchell and Cole applications proposed a residential use of the subject property consisting of a single-family dwelling. Ja158, Ja216, Ja240, Ja274

11. Both the Mitchell application and the Cole application requested substantial variance relief for a front yard set-back. The Mitchell application requested a front yard variance for a 53-foot set back from Maple Avenue and the Cole application requested greater variance relief for a 46-foot set back from Maple Avenue. 169a to Ja172, Ja217, Ja224, Ja275, Ja289

12. Both applications proposed bringing 10 feet of fill on to the property to build upon. Ja94 Line 15 to Line 19, Ja228

13. Both applications proposed constructing a septic system within ten (10) feet of Maple Avenue. Ja167, Ja245

14. Both applications proposed substantial clear cutting along Maple Avenue. The Mitchell application proposed clear cutting along the entire length of Maple Avenue, 254 feet with a depth of 100 feet (25,400 square feet). Ja218 The Cole application proposed clear cutting of 150 feet along Maple Avenue with a

depth of 100 feet (15,000 square feet). Ja63 Line 19 to Ja64 Line 2.

15. Mature vegetation exists up to the edge of Maple Avenue on Block 24, Lot 12.02. Ja218

16. Stephen Creek is not located on any portion of Block 24, Lot 12 and is located over 916.99 feet from Maple Avenue. Ja156, Ja170, Ja217, Ja238, Ja253, Ja275.

17. The adjoining Shaw residence, located upon Block 24, Lot 12.05, maintains a tree lined buffer along Maple Avenue. Ja214.

18. Maple Avenue is a scenic tree lined street with secluded homes. Ja181 to Ja184, Ja214, Ja247 to Ja250.

19. The contract of sale between Robert and Janet Cole and George Macleod for Block 24, Lot 12.02 states: "This agreement is subject to the buyer being able to obtain Pinelands approval and all municipal and state permits required to construct a single family dwelling. If such permits cannot be obtained, this agreement shall be null and void and the deposit returned." Ja190

20. Robert and Janet Cole made a decision to purchase Block 24, Lot 12.02 without obtaining a municipal construction permit to construct a single-family dwelling upon Block 24, Lot 12.02 from the City of Estell Manor. Ja200 to Ja203

21. At the time of his application for variance relief, William Mitchell was the contract purchaser of Ms. Janet Cole. Ja227

22. The adjoining Shaw residence located on Block 24, Lot 12.05 has a preexisting nonconforming front yard setback of 120 feet. Ja77 Line 14 to Line 22.

23. Both the Mitchell application and the Cole application were fully compliant as to building coverage. The Mitchell application proposed building coverage of 1.4%. Ja217. The Cole application proposed building coverage of .8%. Ja 275. The maximum permitted building coverage in the R-25 zone is 10%. Ja217, Ja275

24. Neighboring property owners expressed the following Objections: as a result of the proposed setback of 46 feet, Ten (10) feet of fill being brought to the property, location of the septic system and clear cutting of 150 feet of trees along Maple Avenue:

(a) A resulting diminution of property values if the application was approved allowing construction of a dwelling so close to Maple Avenue; Ja127 Line 11 to Ja128 Line 4, Ja129 Line 13 to Line 15, Ja 134 Line 11 to Line 15, Ja135 Line

22 to Ja136 Line 1, Ja138 Line 6 to Line 17

(b) Flooding on to the Shaw property next door and Maple Avenue; Ja123 Line 12 to Line 25, Ja135 Line 7 to Line 14

(c) Degradation of a scenic tree lined street by clear cutting along Maple Avenue; Ja130 Line 1 to Line 6, Ja 130 Line 22 to Ja131 Line 8, Ja 134 Line 11 to Line 16, Ja138 Line 6 to Line 17

(d) Destroying the secluded nature of the neighborhood by allowing construction of a dwelling that will not be hidden from view; Ja129 Line 6 to Line 15, Ja138 Line 6 to Line 17

(e) Construction of a septic system 10 feet from Maple Avenue; Ja124 Line 8 to Line 11, Ja135 Line 14 to Line 20

25. Board Members determined that the application of Janet Cole was substantially similar to the application of William Mitchell thereby denying the Cole application on the basis of res judicata for the following reasons:

(a) The Cole application sought greater variance relief than the Mitchell application for a front yard setback; Ja73 Line 5 to Line 19, Ja87 Line 13 to Line 19, Ja87 Line 25 to Ja88 Line

3, Ja76 Line 25 to Ja77 Line 4, Ja78 Line 2 to Line 5.

(b) Both applications proposed bringing 10 feet of fill on to the property causing concerns for flooding on to the neighboring Shaw property and Maple Avenue; Ja94 Line 15 to Line 19, Ja228, Ja229, Ja293

(c) Both applications failed to delineate by measurement the location of freshwater wetlands on the subject property; Ja169, Ja170, Ja245, Ja253

(d) Both applications proposed substantial clear cutting along Maple Avenue; Ja218, Ja63 Line 19 to Ja64 Line 2.

(e) Both applications proposed placement of a septic system within 10 feet of Maple Avenue. Ja60 Line 11 to Line 20, Ja61 Line 21 to Line 25, Ja167, Ja245

LEGAL ARGUMENT

1. The Standards of Review

In reviewing the action of any Planning Board, a court's "scope of review is limited." Hawrylo v. Board of Adjustment, Harding Tp., 249 N.J. Super. 568, 578 (App. Div. 1991). The court is required to give deference to the Board's discretion and to attach a presumption of validity to the Board's determination. See Davis Enterprises v. Karpf, 105 NJ 476, 485 (1987). Applying this standard here, this court must give deference to the Board's broad discretion and reverse only if the Board's action was "arbitrary, unreasonable or capricious as to amount to an abuse of discretion." Committee for a Rickel Alternative and Linden Merchants Association v. City of Linden, 111 NJ 192, 201 (1988). A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of an application are not supported by the record. Smart SMR of N.Y. Inc. v. Fair Lawn Bd. of Adjustment, 152 N.J. 309, 327 (1998).

Moreover, as a general rule, the factual determination of a planning board is presumed to be valid. Burbridge v. Mine Hill Twp., 117 NJ 376, 385 (1990). Local public bodies possess "a

peculiar knowledge of local conditions," and "are better suited than is a court to make decisions regarding local zoning issues." Committee for a Rickel Alternative and Linden Merchants Association v. City of Linden, 111 NJ at 201. Planning Board decisions "must be allowed wide latitude in the exercise of their delegated discretion." Charlie Brown of Chatham, Inc. v. Board of Adjustment for Chatham Tp., 202 N.J. Super. 312, 321 (App. Div. 1985). "A Court will not substitute its judgment for that of a board even when it is doubtful about the wisdom of the action." Cell South of New Jersey, Inc. v. Zoning Bd. Of Adjustment of West Windsor Twp., 172 N.J. 75, 81 (2002). A Planning Board is free to either accept or reject the testimony of experts especially where, as here, testimony and evidence was presented to challenge that testimony. Id. at 87. The burden of proof that the action of a Planning Board was arbitrary, capricious or unreasonable is upon plaintiff. Id. at 81. "Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." Charlie Brown of Chatham, Inc. v. Board of Adjustment for Chatham Tp., 202 N.J.

Super. at 321. "The deference accorded to a board's denial of a variance is greater than that given to its decision to grant a variance. Thus, a party seeking to overturn the denial of a variance … must prove that the evidence before the local board was overwhelmingly in favor of the applicant." CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd., 414 N.J. Super. 563, 578-579 (App. Div. 2010).

Point 1. The Trial Court Properly Held That The Board's Invocation Of Res Judicata Was Not Arbitrary, Caprcious Or Unreasonable And Sufficient Evidence Exists To Support Denial Of The Cole Application On The Merits

(Ja45 L. 4-9; Ja54 L. 9-15, 20-23; Ja60 L. 11-20; Ja61 L. 21-25; Ja63 L.19-Ja64 L.2; Ja73 L. 5-19; Ja76 L. 25-Ja77 L. 4; Ja77 L.14-22; Ja78 L. 2-5; Ja87 L. 13-19; Ja87 L. 25-Ja88 L. 3; Ja94 L. 15-19; Ja107 L.19-Ja108 L. 17; Ja123 L. 12-25; Ja124 L. 8-11; Ja127 L. 11-Ja128 L. 4; Ja129 L. 6-15; Ja130 L. 1-6; Ja130 L. 22-Ja131 L. 8; Ja134 L. 11-16; Ja135 L. 7-20; Ja135 L. 22-Ja136 L. 1; Ja138 L. 6-17; Ja148; Ja156-157; Ja167; Ja169-172; Ja176-178; Ja181-184; Ja190; Ja200-203; Ja208; Ja214; Ja216-218;

Ja220; Ja224; Ja227-229; Ja238; Ja240-241; Ja245; Ja247-250; Ja253; Ja269; Ja274-275; Ja285; Ja289, Ja293)

In Charlie Brown of Chatham v. Board of Adjustment, 202 N.J. Super. at 327 the Court held:

"The principles of res judicata and collateral estoppel are applicable not only to the parties in courts of law, but also in administrative tribunals and agency hearings. ... here, plaintiff obtained site plan approval from the Planning Board on the express condition that the second floor apartments would not be used or occupied as a residential unit or for residential purpose. The resolution of the Planning Board was a determination made by a quasi-judicial body which precluded plaintiff from again submitting the same issue to the Zoning Board, also a quasi-judicial body, for a second determination. The issue was determined once and having been so determined could not be submitted for a second determination." Id. at 327.

As stated in Mazza v. Linden Bd. of Adj., 83 N.J. Super. 494, 496 (App. Div. 1964):

"Whether an application is to be rejected on the grounds of res judicata is in the first instance for the board to determine. Even if the application is closely similar to the previous one, or identical with it but it is alleged that the surrounding circumstances have changed or that experience has shown in the prior denial to be in error, it is within the discretion of the board whether to reject the application on the ground of res judicata, and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness."

In the present matter, the essential elements of Plaintiff's variance application mirrored the application of William Mitchell for the same property which the Board denied in January 2021. The

application of Ms. Cole contained the following question #17: Has any application of any type ever been made to the Planning/Zoning Board of adjustment of the City of Estell Manor in connection with the lot in question? Ja241. If so, please state the following:

1. Nature of application: Response-Variance application of William Mitchell. Ja241
2. Board before which application presented: Response- Estell Manor Land Use Board. Ja241
3. Decision of Board and date of decision: Response- see resolution, attached. Ja241

"One of the reasons for the existence of this question is to determine if the same parties or their privies have previously sought essentially the same relief" from the Planning Board. Cox & Koenig, New Jersey Zoning and Land Use Administration Chapter 19-3.2 (Gann, 2022). "Under the doctrine of res judicata, if the same parties or their privies do seek the same relief in the same factual setting, the case may be dismissed on the ground that it had already been decided. The doctrine of res judicata is one which has been evolved by the courts to prevent the same case being brought before the court time after time". Id. "As a general rule, an

adjudicative decision of an administrative agency should be accorded the same finality that is accorded the judgment of a court." Bressman v. Gash, 131 N.J. 517, 526 (1993).

In Bressman the Court held that the local land use board has the power to determine initially whether a change is sufficient to warrant a second review, and that determination should be overturned only if arbitrary or capricious. Id. at 527. The role of a reviewing court "is to defer to the local land-use agency's broad discretion and to reverse only if we find its decision to be arbitrary, capricious or unreasonable." Id. at 529. "Thus, the question is not whether a reviewing court would have reached a different conclusion if it had initially decided the matter ... but whether the Planning Board was arbitrary, capricious, or unreasonable" in reaching its decision to apply the doctrine of res judicata to the second application. Id. at 527.

The Bressman court went on to state the rationale behind this doctrine. The application of the doctrine to administrative decisions, like its application to judicial decisions rests on policy considerations such as "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary

burdens of time and expense; elimination of conflicts, confusion and uncertainty; and basic fairness." Id. at 527.

In order for the doctrine of res judicata to be applicable, it must be shown that:

(1)The second application is substantially similar to the first;

(2)The same parties or their privies are involved;

(3)There must be no substantial change in the application itself or conditions surrounding the property;

(4)There must have been an adjudication on the merits in the first case;

(5)Both applications must involve the same cause of action. Cox & Koenig, New Jersey Zoning and Land Use Administration Chapter 19-3.2 (Gann, 2022). See also Charlie Brown of Chatham, Inc. v. Board of Adjustment for Chatham Tp., 202 N.J. Super. at 327. ("The general requirements for the invocation of the principle are a final judgment by a court or tribunal of competent jurisdiction, identity of issues, parties, causes of action and thing sued for.")

In the present matter the application of the Doctrine of res judicata applies for the following reasons:

The application made by Janet Cole decided on July 21, 2021 is substantially similar to the application of William Mitchell decided on January 27, 2021.

(1)Identity of issues exists. Each application sought a front yard variance for construction of a single-family residence on the same property. Mr. Mitchell sought a variance with a 53-foot setback in a zone where 200 feet is required. Ja167, Ja172, Ja217 Ms. Cole sought greater variance relief by requesting a 46-foot set back where 200 feet is required. Ja275

(2) Identity of parties exists. The same parties or their privies were involved in both applications. William Mitchell was the contract purchaser of Ms. Cole. Ja148 Ms. Cole testified in favor of the William Mitchell application and in favor of her own application using essentially identical testimony. Ja220, Ja285 See Campus Assocs. V. Hillsborough Zoning Bd., 413 N.J. Super. 527, 538 (App Div. 2010) (Because a variance once granted runs with the land, a contract purchaser and landowner are for purposes of the doctrine of res judicata the same parties or their privies.)

(3) Over the course of 6 months there was not any substantial

change in the conditions surrounding the property and the Cole application sought greater variance relief. Ja217, Ja224, Ja275, Ja289

(4) There was an adjudication on the merits for the Mitchell application resulting in a denial of his variance request. Ja224

(5) Both applications involved the same cause of action and thing sued for, a variance request for a front yard setback on the identical block and lot. Ja156, Ja238

In Pieretti v. Bloomfield, 35 N.J. 382 (1961) an applicant sought greater relief in a second application made in 1958 than it sought in its first application made in 1944, which was denied, for expansion of a nonconforming use. The 1958 application sought to construct a larger building covering more residentially zoned land than the initial application. The Court held: The second application was appropriately barred by the Town Council upon its finding that res judicata applied. Id. at 385.

In the present matter the Mitchell application sought a front yard set back variance request to allow construction of a single-family residence 53 feet from Maple Avenue where the zone requires 200 feet. Ja224 The Cole application, decided six months

after the Mitchell application, sought even greater relief seeking a front yard set back variance request of 46 feet from Maple Avenue to construct a single-family residence for the same property. Ja275 Contrary to the contention of Plaintiff, both applications proposed a residential use for this property. Ja156, Ja238 The Mitchell application did not suggest a second use of any kind. Pole barns are a common accessory structure to a single-family residence in rural communities such as Estell Manor.

Appellant's reliance upon Nuckel v. Little Ferry Planning Bd., 208 N.J. 95 (2011) for the proposition that the construction of a second driveway constitutes a second primary use is misplaced. Driveways are an accessory use to a single-family residence. Driveways are incident and subordinate to a single family-residence and are customarily so. The holding in Nuckel is factually distinguishable from the present matter. The Court in Nuckel held that the proposed driveway in question constituted a second primary use because it serviced a hotel on an adjacent lot and not the auto body shop located upon the subject lot. A d (1) variance is not required for a second driveway where the driveway does not service an adjacent property. See Mountain Hill, L.L.C. v. Zoning Bd. of

Adjustment of Middletown, 403 N.J. Super. 210, 243 (App. Div. 2008) certify. denied, 197 N.J. 475 (2009). ("Driveways are so ineluctably incidental to any main structure and so customary for all structures that they are permitted accessory structures and uses in every zone.").

Contrary to the argument of Plaintiff both applications were well within the 10% bulk requirement for maximum building coverage. The Mitchell application proposed a building coverage of 1.4% and the Cole application proposed a building coverage of .8 %. See Ja217 and Ja269. Neither application exceeded the 10% limit for maximum building coverage. Ja217, Ja275 Contrary to the argument of Plaintiff the Cole application did not present a significantly revised plan regarding the size of the proposed single-family residence. The Mitchell application proposed a 30' x 60' single family dwelling. Ja158. The Cole application also proposed construction of a 30' x 60' single family dwelling with garage. Ja245. Contrary to the argument of Plaintiff the percentage of wetlands found on this property is not 89% because it has not been determined by a measurement made by a licensed professional. Ja169, Ja170, Ja54 Line 9 to Line 15 and Line 20 to Line 23, Ja107

Line 19 to Ja108 Line 17.

Both applications requested substantial clear cutting along Maple Avenue destroying the scenic tree lined street, neighborhood seclusion and undeveloped feel of the neighborhood. 169a to Ja172, Ja217, Ja224, Ja275, Ja289 Both applications raised substantial concern with regard to water runoff affecting neighboring properties. Ja123 Line 12 to Line 25, Ja135 Line 7 to Line 14 Both applications proposed substantial fill be trucked to the property to increase the grade of the home by 10 feet thereby raising flooding concerns for a neighboring property and Maple Avenue. Ja94 Line 15 to Line 19, Ja228, J229Both applications proposed placement of a septic system 10 feet from Maple Avenue. Ja167, Ja245 Both applications detracted from the existing characteristics of the neighborhood scheme. Ja129 Line 6 to Line 15, Ja130 Line 1 to Line 6, Ja 130 Line 22 to Ja131 Line 8, Ja134 Line 11 to Line 16, Ja138 Line 6 to Line 17

In the present matter, Plaintiff failed to demonstrate that sufficient changes had been made to justify a different result. The essential nature of the application remained unchanged. Instead of reducing the front yard nonconformity, which was found to be

objectionable in the Mitchell application, Ms. Cole elected to increase that same nonconformity. Instead of finding a way to leave a tree lined street as undisturbed as possible, which clear cutting along Maple Avenue was found objectionable in the Mitchell application, both applications sought to significantly disturb the scenic tree lined street, neighborhood seclusion and the undeveloped feel of the neighborhood. The Cole proposal to clear cut 150 feet of trees along Maple Avenue is unnecessary to bring construction equipment on to the property for purposes of constructing a single-family residence. Contrary to the contention of Plaintiff, the neighboring Shaw property is tree lined along Maple Avenue with the exception of a horseshoe driveway immediately in front of the home. Ja176 to Ja178 and Ja208.

Instead of finding a way to move the septic system to a location farther from Maple Avenue, Ms. Cole elected to place the septic system in the same location as the Mitchell application. In addition, the issue of water runoff on to the adjacent property owned by Mr. Shaw and Maple Avenue resulting from raising the grade of the subject property by 10 feet, which was found to be objectionable in the Mitchell application, was again not satisfactorily addressed.

Water runs down-hill. Both applications proposed raising the grade of the property by 10 feet, utilization of drywells to contain water runoff from the house and utilization of retaining walls. Nothing was presented by either applicant to adequately address water runoff resulting from raising the grade of the property other than channeling water from four downspouts to four drywells. Raising the grade of the property by 10 feet constitutes a dramatic topographic alteration which was not adequately addressed for purposes of water runoff.

The Estell Manor Planning Board has the power to determine initially whether a change is sufficient to warrant a second review, "a determination that should be overturned on review only if it is shown to be unreasonable, arbitrary or capricious". Bressman v. Gash, 131 N.J. at 527. The decision of the Estell Manor Planning Board was not unreasonable, arbitrary or capricious. The Estell Manor Planning Board did not abuse its discretion. There is more than sufficient evidence in the record to establish that there were insufficient changes made by the Cole application to warrant a second review on its own merits. Accordingly, the Estell Manor Planning Board reasonably reached its decision.

Furthermore, Russell v. Board of Adjustment of Borough of Tenafly, 31 N.J. 58 (1959) factually supports the decision made by the Estell Manor Planning Board. In Russell the applicant applied for a variance "which would allow him to modify both the setback line and minimum area requirements of the local zoning ordinance." Id. at 63. The Board denied the application and the applicant failed to appeal the decision. Id. One month after the denial revised plans were submitted and thereafter the applicant presented a second application to the board of adjustment. Id. The applicant's new plans extended the proposed setback from 25 feet to 30 feet and reduced the area to be used for the building. Id. The board of adjustment determined that the modifications were sufficient to constitute a new application and granted the applicant's variance request. The New Jersey Supreme Court upheld the decision of the board of adjustment finding that the second application sufficiently differed from the first application by reducing both bulk nonconformities to warrant entertainment of the second application. Id. at 66-67.

In the present matter, instead of reducing the bulk nonconformity as in Russell, Ms. Cole elected to increase the

nonconformity request. This factor alone is sufficient basis for the doctrine of res judicata to apply to this application. Put simply, the Estell Manor Planning Board did consider all the evidence presented and found sufficient support in the record to reach its decision.

Point 2. The Planning Board Had Jurisdiction To Approve or Deny Plaintiff's Variance Application And the Trial Court Had Jurisdiction To Review This Decision

(Not Raised by Plaintiff Below)

(Ja169-170, Ja197, Ja245, Ja253)

The Estell Manor Planning Board had jurisdiction to approve or deny the variance request of Janet Cole. The 1986 Waiver of Strict Compliance obtained by Janet Cole as memorialized in the January 29, 1987 NOTICE OF FILING does not constitute an approval. Ja197, Ja271. "It does authorize any other agency to review and act on the proposed development." Ja197 A municipal planning board has the right to reject a proposed development within the Pinelands if it determines that the criteria for a variance is not met even if a waiver of strict compliance is obtained. The Pinelands Comprehensive Management Plan contains minimum standards for

development within the Pinelands. See N.J.A.C. 7:50-1.1 to -7:50-10.35.

The Pinelands Commission designated local governments as the "principal management entities" of the Comprehensive Management Plan. N.J.A.C. 7:50-3.1 (a). "The Legislature did not intend to withdraw all local review whether the municipality is located in a certified or uncertified region." Fine v. Galloway Township Committee, 190 N.J. Super. 432, 441 (Law Div. 1983). There is nothing "that would preclude a municipality from requiring compliance with its own local land use ordinances, in addition to compliance with the minimum standards of the Plan, provided the ordinance does not conflict with the plan or regulate a matter controlled by the Plan." Id.

"The goal of both the Pinelands Protection Act and the Comprehensive Management Plan is to promote orderly development in the Pinelands Region so as to protect, preserve and enhance the significant and unique resources of that region." Id. There is "nothing in either the act or Plan which prevents a municipality from adopting and enforcing more restrictive standards ..." Id.

Estell Manor ordinances 380-33 C. (6) and (7) and 380-35 D. do not conflict with the Comprehensive Management Plan and do not regulate a matter controlled by the Plan. The variance application of Mr. Mitchell was denied on the merits and the application of Janet Cole was also denied as it was substantially similar to the application of Mr. Mitchell which was previously denied.

Furthermore, there does not exist any conflict between enforcement of the Estell Manor land use ordinances and the Pinelands Comprehensive Management Plan as applied to both the Cole and Mitchell variance applications. The Pinelands waiver of strict compliance does not constitute an approval. If the Estell Manor Planning Board elects to enforce local Estell Manor Ordinance 380-35 D. to deny an applicant a variance request to build within 300 feet of wetlands it is free to do so. If the Estell Manor Planning Board finds that an applicant has failed to satisfy its burden that the development would not have a substantial detrimental impact upon neighboring properties it is free to do so. If the Estell Manor Planning Board elects to find that an applicant has not satisfied its burden of proof of both the positive and negative

criteria, it is free to do so. If the Estell Manor Planning Board finds that the development would be esthetically unpleasing, cause flooding on neighboring properties and damage the character of the neighborhood, it is free to do so.

In addition, this is a lot with a depth of 916.99 feet. The exact location of wetlands on and within 300 feet of this property has never been determined by measurement of a licensed professional. All references to the location of wetlands on the property as contained in the variance plans prepared by Engineering Design Associates are only approximations "taken from NJDEP mapping". See Ja169, Ja170, Ja245, Ja253. The Engineering Design Associates variance plans fail to provide any measurement of distance from Maple Avenue to the location of wetlands on the property. Stephen Creek is not located on this property. It is located behind and in close proximity to this property on another parcel of land. Ja170. Ordinance 380-33 (6) provides as follows: "The front yard shall be as close to 200 feet as practicable, taking into consideration the depth of the lot in question." Application of Estell Manor Ordinance 380-33 (6) and (7) cannot be utilized without knowing exactly how far from Maple Avenue wetlands currently exist. This is critical

information. Without this information the Board and Board Engineer and Professional Planner David Scheidegg properly utilized 200 feet as the appropriate standard for front yard variance relief consideration of both the Mitchell and Cole applications. Nothing was ignored by the Board. Both Mr. Mitchell and Janet Cole sought a hardship variance due to the presence of wetlands on the subject property yet failed to present any evidence demonstrating exactly what distance from Maple Avenue the wetlands currently exist. No conflict exists by way of enforcement and application of the Estell Manor land use ordinances and the Pinelands Comprehensive Management Plan.

CONCLUSION

For all the foregoing reasons it is respectfully asserted that the decision of the Trial Court dismissing with prejudice Plaintiff-Appellant's Complaint be affirmed.

Griffith and Carlucci, P.C.

Date 9/17/24 By: Richard A Carlucci
Richard A. Carlucci, Esquire